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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

342 U.S.
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ANO-ASP

No. 171

ANDERSON-TULLY COMPANY, Owner of 8 Acres of Land in Warren County, Mississippi,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 171

ANDERSON-TULLY COMPANY, OWNER OF 8 ACRES OF LAND IN WARREN COUNTY, MISSISSIPPI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Petition

MAY IT PLEASE THE COURT:

Your petitioner, Anderson-Tully Company, owner of eight acres of land in Warren County, Mississippi, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on May 16, 1951, affirming a judgment of the District Court of the United States for the Western Division of the Southern District of Mississippi.

Statement of Matter Involved

This is a proceeding brought by the respondent, United States of America, to condemn a tract or parcel of land

located in Warren County, Mississippi, and owned by petitioner, Anderson-Tully Company. The land is to be used by the Army in connection with the control of floods on the Mississippi River. The jury awarded the petitioner $12,500.00. An appeal was prosecuted to the Court of Appeals for the Fifth Circuit and the Court of Appeals affirmed the judgment below. Petitioner contends that the award made by the jury does not represent a just compensation under the guarantee furnished by the Fifth Amendment of the Constitution and that the trial court erred in refusing to permit proof of the cost of reproducing or replacing the condemned area and in excluding evidence as to the market value of fixtures and structures on the land which had not been removed by the United States Government, the United States previously having the property in question under lease prior to the condemnation proceedings and having placed thereon certain fixtures and structures during the life of its lease.

Jurisdictional Statement

The petition in condemnation was filed in the United States District Court for the Southern District of Mississippi under the provisions of the following Acts of Congress:

Act approved August 1, 1885 (25 Stat. 357) and Acts Supplementary and Amendatory thereof;

The Rivers and Harbors Act approved July 18, 1918 (40 Stat. 911);

The Flood Control Act of May 15, 1928 (45 Stat. 534);

The Flood Control Act of August 18, 1941 (55 Stat. 638);

The War Department Several Appropriations Act of 1938 Approved July 19, 1937.

Petitioner respectfully invokes the jurisdiction of this Honorable Court as follows:

1. The Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this court. Supreme Court Rule 38, Section 5, Subdivision B.

2. The Court of Appeals for the Fifth Circuit has decided a Federal question of law in a way probably in conflict with applicable principles of law as announced by the United Supreme Court in the following cases:

United States v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396, 70 S. Ct. 217;
Standard Oil Co. v. *Southern Pacific Co.*, 268 U. S. 146, 45 S. Ct. 465, 69 L. Ed. 890;
United States v. *Miller*, 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336, 147 A. L. R. 55;
Kimball Laundry C. v. *United States*, 338 U. S. 1, 69 S. Ct. 1434, at 1438.

3. This litigation presents a question of general importance relating to the construction and application of the Fifth Amendment of the Constitution of the United States and the practical application thereof in determining the standard of just compensation payable in a condemnation case instituted by the United States Government. Rule 38, Section 5 (c).

4. The Court of Appeals for the Fifth Circuit has rendered a decision in the instant case in conflict with the decisions of other Circuit Courts of Appeal on the same question as follows:

Union Electric Light & Power Co. v. *Snyder Estate Company*, (8th Cir.), 65 F. 2d 297, at 304-305;
United States v. *Becktold Co.*, (8th Cir.), 129 F. 2d 473, at 477-478;
Clark v. *United States*, (8th Cir.), 155 F. 2d 157, at 160-161;

Hard & Rand v. *Biston Coffee Co.*, (8th Cir.), 41 F. 2d 625, at 627;

United States v. *Wise*, (4th Cir.), 131 F. 2d 851, at 852-853;

United States v. *2.4 Acres, etc.* (7th Cir.), 138 F. 2d 295, at 299;

Westchester County Park Commission v. *United States*, (2nd Cir.), 143 F. 2d 688;

In Re United States Commissioner to Appraise Washington Market Company Property, 295 F. 950, 54 App. C. D. 129; Certiorari dismissed *United States* v. *Washington Market Company*, 265 U. S. 598, 44 S. Ct. 634, 68 L. Ed. 1199.

Rule 38, Section 5 (b).

Questions Presented

1. Did not the District Judge and the Court of Appeals err in holding that there were other comparable parcels or tracts of land in Vicksburg or in the vicinity of Vicksburg, Mississippi, comparable to the tract of land condemned?

2. Did not the trial court err in refusing to permit the petitioner to introduce and submit to the jury evidence of the reproduction or replacement costs of the premises?

3. Did not the District Judge err in excluding consideration by the jury of the market value of the fixtures and structures on the condemned area which had not been removed by the lessee United States prior to July 1, 1945?

4. Did not the courts below err in holding that one isolated sale of dissimilar property was sufficient to establish a "market value" upon which compensation to the petitioner should be based?

Reasons for Allowance of Writ of Certiorari

1. Petitioner submits that the Court of Appeals decided an important question of law in a manner which conflicts

with decisions of this Honorable Court in holding inadmissible evidence of the cost of replacement or reproduction of the condemned site. The evidence shows without conflict that the condemned area was the only parcel or tract of land between Memphis, Tennessee, and New Orleans, Louisiana, having its peculiar advantages of ready accessibility to water, rail and highway. The evidence further shows that there was only *one* sale of even *remotely* comparable land in the Vicksburg area within several years of the condemnation proceeding. Under such circumstances this court has held that evidence of isolated sales is insufficient to establish a "market" and that the jury should then be allowed to consider other evidence as a guide to ascertain the just value of the tract condemned, including the cost of reproducing the condemned property.

2. The decisions of the courts below deprives petitioner of the "just compensation" guaranteed by the Fifth Amendment.

3. The Court of Appeals relied upon the "opinion evidence" of some six witnesses who attempted to establish a market value of the premises condemned. The fallacy of thus relying on their testimony is revealed by an examination of the record. *Each* witness testified that there was no other site in the Vicksburg area comparable to the condemned area and that there had been no sales of comparable property in several years preceding the condemnation proceeding, but they were permitted to give an imaginary value to the condemned tract after testifying substantially as follows: (1) There were no tracts comparable to that condemned. (2) There had been no sale of waterfront property in Vicksburg because none were available. (3) There were some other sites on the river front which were not similar and were not for sale. (4) They then put a mental value on these dissimilar sites. (5) They then used these imaginary

values as a yard stick in placing a value on the condemned area. To permit the jury to fix a value on the basis of such testimony, unleavened by the testimony as to replacement costs, is to make a mockery of the shield of the Fifth Amendment intended to protect the owner from ALL LOSS when his private property is taken for public use.

Wherefore, petitioner prays that a writ of certiorari be issued by this Honorable Court directed to the United States Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, commanding that court to certify and send to this court, for its review and determination, on a day to be designated, the record and cause on the docket of said Court of Appeals numbered 13,026 and there styled "Anderson-Tully Company, Owner of 8 Acres of Land in Warren County, Mississippi, Appellant, versus United States of America, Appellee" and that any judgment which may be based thereon by the District Court for the Southern District of Mississippi be reviewed by this Honorable Court, and that petitioner have such other and further relief as to this Honorable Court appears just.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinions of the Court Below

No opinion was rendered by the District Court other than the order confirming the jury award (R. p. 446) and the order over-ruling petitioner's motion for a new trial (R. p. 451).

The opinion of the Court of Appeals rendered May 16, 1951, is reported 188 Fed. (2d) —.

II. Jurisdiction Invoked

Statement of the jurisdiction invoked appears in the petition of certiorari. Reliance is had upon the Revised Rules of this Court, Rule 38, Section 5, Subsection b.

III. Statement of the Case

Petitioner owned a tract of land on what is known as the Yazoo Diversion Canal a short distance north of the City of Vicksburg, Mississippi. This canal was formerly a bed of the Mississippi River, but in 1876 the river abandoned its bed through an avulsive change and adopted a new channel some distance south of Vicksburg. Vicksburg became isolated as a river port and to correct this condition the United States Engineers dredged out the old river bed, diverted the Yazoo River into this channel or canal, and once again (1903) the city had access to the Mississippi River and its water borne commerce.

From 1904 to 1924 petitioner was operating an eight foot band mill with a capacity of 5000 feet of lumber an hour on this tract (R. p. 403). This was considered a large sawmill and was approximately 40 feet wide by 140 feet long (R. p. 404). In 1924 the mill was destroyed by fire (R. 406) and beginning October 27, 1924 (R. p. 229) the petitioner leased

the site to the United States from year to year until June 30, 1945, when the lease expired (R. p. 229).

In order to provide flood protection for an industrial area in the City of Vicksburg, a seawall and levee were built along the Diversion Canal in the Southern section of the City. The seawall was necessary because the area protected thereby was low land and subject to overflow. This seawall impounded water from rains and seepage on the land side which had to be continually pumped from the area (R. 145, 185). This industrial area, some two miles downstream from the condemned land is so thickly developed that very few small parcels could be found therein not already in use. None of the vacant areas had all of the advantages of the condemned area.

Adjoining and Northward from the condemned area the Government a number of years ago purchased a narrow strip of land between the railroad and the Diversion Canal. On this the Corps of Engineers have installed and maintained the United States Army Engineers Fleet Installation, commonly called the "Government Fleet". This center is for the repair shops and fleet storage of all of the Vicksburg District Engineers' Vessels on the river (R. 46). For the purpose of serving the Government Fleet, the Government is charged with maintaining a low water channel 6½ feet deep by 90 feet wide from the Mississippi River to the upper end of Centennial Lake, beyond the condemned area and the Government Fleet property (R. 39). Of course at ordinary stages the channel is much deeper. This gives the condemned area navigable access at all times to the Mississippi River from the quiet and protected harbor of Centennial Lake (R. 384, 335).

The tract condemned consisted of 8 acres of land, approximately 4 acres of which was usually covered by the waters of the Yazoo River. Of the remaining 4 acres, .407 acres

was on the same elevation, 103.4, as was the railroad and the highway to the east. This area was 430 feet long and 55 feet in width on the north end, tapering down in width towards the south end until it reached a width of 35 feet, where it then extended a very short distance to a point (R. p. 284). Immediately to the east of the tract was the main line of the Illinois Central Railroad running north and south through Vicksburg and immediately to the east of the railroad was the four lane paved U. S. Highway 61. The property was served by a free switch track open on both ends. At the time of condemnation, the United States was using the premises as an oil terminal and as a warehouse area, having constructed thereon an extensive oil loading dock on creosoted pilings and a warehouse building.

At the trial of the case, the Government offered opinion evidence of witnesses as to the "market value" of the area condemned. Anderson-Tully Company then introduced many witnesses to prove the unique character of the condemned area, the fact that there was no comparable property within the vicinity, and that no comparable sales had been made by which a market value had been, or could be, established. Then petitioner offered to prove that it would cost $84,362.22 to reproduce, or replace, an equivalent of the condemned area on its own property immediately adjacent to the south, where this could be done cheaper than anywhere else, and where the physical conditions of the two tracts would be exactly the same. This was exclusive of the fixtures which were on the property when it was taken by the Government on July 1, 1945 (R. 350-354). Then petitioner offered to prove that at the time of the taking the fixtures on the condemned area were worth $20,825 (R. 356). This evidence therefore tended to prove that it would actually cost petitioner $105,187.22 to put in as good a position pecuniarily as it occupied before its property was taken.

The court refused to permit this evidence to go to the jury, consistently holding throughout the trial that the "evidence of reproduction cost is not admissible in this case" (R. 231, 346, 371, and passim). Likewise was all evidence as to the value of fixtures and structures on the land at the time of its taking rejected by the court (R. 54, 228).

IV. Argument

The basic error running throughout the trial of this case below and the hearing upon appeal is the insistence of the two lower courts in holding that the petitioner should be restricted to evidence of the "market value" of the condemned area when the record shows conclusively that there was no *market* established for industrial sites of this kind.

In the language of Mr. Justice Clark in delivering the opinion of the court on December 12, 1949, in the case of *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 70 S. Ct. 217, the record here again presents this court "with elusive questions of property valuation in determining whether the United States awarded 'just compensation' under the Fifth Amendment."

In his concurring opinion, after referring to "the treacherous nature of the subject matter", Mr. Justice Frankfurter declares:

> "Resort to the conventional formulas for ascertaining just compensation for the taking of property rarely bought and sold, and having therefore no recognized market value, does not yield fruitful results. The variables are too many to permit of anything except an informed judgment. Everything, therefore, turns on the process of judgment to the end that judgment be not based on standards too difficult of application or evidence too tenuous for solid inferences." 70 S. Ct. at 224.

It is pointed out in the principal opinion that each case must be considered upon its own facts, citing *Olson* v. *United States*, 292 U. S. 246, 255, 54 S. Ct. 704, 708, 78 L. Ed. 1236. Therefore, the opinion emphasizes first that:

> "Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules."

After citing *United States* v. *Miller*, 317 U. S. 369, 374, 63 S. Ct. 276, 280, 87 L. Ed. 336, 147 A. L. R. 55, the court then applies the exception to the general rule that "market value" "is most likely to place the claimant in the pecuniary position he occupied before the taking", by holding:

> "At times, however, peculiar circumstances make it impossible to determine a 'market value'. There may have been, for example, so few sales of similar property that we cannot predict with any assurance that the prices paid would have been repeated in the sale we postulate of the property taken. We then say that there is 'no market' for the property in question." 70 S. Ct. at 221.

The court then holds that 5 sales of dissimilar property at varying prices are insufficient to establish a market value and therefore other measures of value are relevant. 70 S. Ct. at 221.

The law is clear and well settled that where a market value cannot be established because of the absence of a sufficient number of more or less contemporaneous sales of similar property evidence of reproduction or replacement cost of the property taken is always competent on the issue of value.

With reference to reproduction cost, in footnote 5 to the opinion in *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, supra, the court refers to *Standard Oil*

Co. v. *Southern Pacific Co.*, 268 U. S. 146, 45 S. Ct. 465, 69 L. Ed. 890, from which we quote:

> "It is fundamental in the law of damages that the injured party is entitled to compensation for the loss sustained. Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, and thereby to be put in as good position pecuniarily as if his property had not been destroyed. . . . Where there is no market value such as is established by contemporaneous sales of like property in the way of ordinary business . . . other evidence is resorted to . . . And by numerous decisions of this Court, it is firmly established that the Cost of Reproduction as of the date of valuation constitutes evidence properly to be considered in the ascertainment of value (many case cited)".
>
> *Standard Oil Co.* v. *Southern Pacific Co., supra*, 69 L. Ed. 895.

To the same effect in a recent eminent domain decision controlling here is *United States* v. *Miller*, 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336, 147 A. L. R. 55, cited in the *Toronto, Hamilton & Buffalo Navigation Co.* opinion, which states the basic principle here involved as follows:

> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." 87 L. Ed. at 342 citing
>
> *Seaboard Air Line R. Co.* v. *United States*, 261, U. S. 299, 304, 67 L. Ed. 664, 669, 43 S. Ct. 354; and
>
> *United States* v. *New River Colliers Co.*, 262 U. S. 341, 343, 67 L. Ed. 1014, 1017, 43 S. Ct. 565.

We will concede that the learned Court of Appeals declared that a market did exist because of the sale of *one*

tract of land (R. p. 468) but we contend that it takes more than one swallow to make a summer. In fact, this Court has held *five* sales of dissimilar property as not sufficient to establish a market. *U. S.* v. *Toronto, Hamilton & Buffalo Navigation Co.*, ante.

While ordinarily a finding of fact made by a lower court will not be disturbed by this Court on appeal, this rule is subject to exceptions.

> "It is further urged that even of this court should hold that the sole ground upon which the circuit court of appeals proceeded, namely, that the former judgment is a bar to this action, was untenable, nevertheless the judgment of the district court ought not to be affirmed, because there is no testimony in the record adequate to sustain the verdict and judgment of that court. The case in the appellate court must be determined, not by considering and weighing conflicting testimony, but upon a decision of the question as to the presence of testimony in the record fairly tending to sustain the verdict. . ."
>
> *Lizzie Troxell, Admx. of the Estate of Joseph Daniel Troxell, Deceased*, v. *Delaware, Lackawanna & Western Railroad Company*, 277 U. S. 434, 57 L. Ed. 587, — S. Ct.

> "We cannot accept the contention of the government's counsel that, because the jury was left to determine whether the pass was in fact navigable, and found the defendant guilty, the decision of the jury is binding upon the appellate court. We have a right to consider under that instructions and definitions, given by the trial court, the jury found their verdict."
>
> *Robert S. Leovy* v. *United States*, 177 U. S. 621, 44L. Ed. 914, — S. Ct.

See also *Thompson Spot Welder Co.* v. *Ford*, 265 U. S. 445, 44 S. Ct. 533, 68 L. Ed. 1098 and *Texas & New Orleans*

Railway Co. v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034.

In the three cases of *United States* v. *Toronto, Hamilton & Buffalo Navigation Co., Standard Oil Co.* v. *Southern Pacific Co.,* and of *United States* v. *Miller, ante,* this Court found it necessary to the ends of justice to go beyond the lower courts erroneous *conclusions* in the absence of evidence to justify them. The holding of the courts below that a "market" did exist was nothing but an erroneous legal conclusion which this Court has always reserved the right to review.

We recognize the inability of this court to review exhaustively the records in which writs of certiorari are sought, and, therefore, to assist the Court in determining that there was an utter absence of any evidence to show sufficient sales of *similar* property for anywhere near uniform prices, we are taking the liberty of reviewing at greater length than we ordinarily would the testimony of *every* Government witness.

Julian W. Leggett, the Government's official Land Appraiser (R. p. 37-92) upon whose valuation the Government estimated just compensation to be $6,000.00 (R. 22-26), admitted that he had not a single sale of comparable property upon which to base his appraisal. Even the dissimilar Moore Tract had not then been sold (R. 48).

He frankly testified: There had been no sales of similar lands in the vicinity of Vicksburg along the water front at that time I considered applicable (R. 50). In his judgment, "value" or "market value" are merely mental concepts (R. 41), and his conclusion that the condemned area was worth $6,000.00 in July, 1945, was offered regardless of the absence of a single other sale of comparable property, and with no reference to market; or, using his own language: "In other words, market or no market" (R. 50-51).

We know of no legal justification for the consideration of such an opinion.

He finally admitted that he could not point out any other spot along the Yazoo Canal river front of Vicksburg that was comparable to the condemned area with reference to the advantages which it enjoyed (R. 72).

His actual testimony clearly shows that the tract condemned is entirely dissimilar to the Moore tract mentioned in the opinion of Judge Borah below.

> Q. Mr. Cashman and Mr. Geary. All right. Thank you. Now did you consider any recent sales of property along the riverfront of industrial sites in reaching your conclusion?
>
> A. You mean before or——
>
> Q. Within a reasonable time. Did you consider first any sales? Did you take that into consideration, actual sales on the market of industrial site property along the riverfront in this vicinity?
>
> A. At the time I made this appraisal, there were apparently very few sales of industrial properties along the riverfront that were applicable in my opinion due to their remoteness to the time of this taking. Now after this, after I made this appraisal and during the same month—that was July 1945—there was a sale—I believe Mr. E. C. Neill et al. to Dade W. Moore.
>
> Q. Well, you did not take that sale into consideration then if it was after your appraisal?
>
> A. No, sir, I could not.
>
> Q. Therefore, in reaching your conclusion, in your opinion, at that time in July, 1945, there had not been any sales of comparable property in the entire vicinity, had there?
>
> A. Now let me——
>
> Q. I think that is what you said.
>
> A. Would you allow me to finish answering the first question you asked me, which was was there any comparable sales, and I pointed out to you there was a sale

after the facts, in other words, and let me correct this: I said in July. It appears the sale is the 23rd of October, 1945, and this taking was in July. This sale was E. C. Neill et al. to Dale W. Moore et al. Now I did examine this particular piece of property in this sale, and it is presently used as an oil terminal by the Cities Service Corporation. The land area involved in the sale comprised about 1.06 acres situated on the top bank or, in other words, above overflow on the Mississippi River. Now there is a difference, of course, in the two locations. One is on a canal with a 6½-foot channel; this is on the water, in other words, the Mississippi River.

Q. And it was, one and what was the acreage?

A. 1.06.

Q. 1.06 acres?

A. Yes, sir.

Q. Do you recall what was paid for that site?

A. Yes, Sir. The consideration was $10,000.

Q. Do you know what the Cities Service paid for it?

A. No, sir, I am not familiar with that. This only involved the land area at that time.

Q. Nothing was on it?

A. Vacant land, yes, sir.

Q. What was the elevation of that land, Mr. Leggett?

A. I can't give it to you in exact feet. The land I do know is above overflow and appears to be some fifteen or twenty feet above mean high water.

Q. But it is on the main channel of the Mississippi River?

A. Yes, sir, it is.

Q. And it is not in the area extending from the mouth of the Yazoo through the entire Vicksburg waterfront area from the mouth of the Yazoo upstream where you have quiet water?

A. No, sir. When you make reference to the Vicksburg waterfront, you must of necessity take in certain installations on the river itself.

Q. I see.

A. That part of the Mississippi River plus the chan-

nel here is what you would normally comprise as the Vicksburg waterfront.

Q. I see. Now would you be kind enough and fair enough to give us the difference, in your opinion, in advantages and disadvantages between the condemned area of the Anderson-Tully property and this 1.06 acres to which you have just referred on the main channel? Discuss, compare the two pieces of property.

A. Insofar as area is concerned, of course, the Anderson-Tully property contained .4 acre and this property 1.06 acres. The other application here: both are above overflow. The Anderson-Tully property, as I have said before, is on a minimum 6½-foot channel. Of course, that only applies during low water season. What I will refer to as the Moore terminal site or Moore site in my discussion is on deep water the year round. In other words, with the difference of one being on a small channel and the other on the Mississippi River where you have deep water, they are very, very comparable.

Q. In other words, you find no difference?

A. I wouldn't say that, but comparable.

Q. Comparable in value?

A. In my opinion, yes, sir.

Q. We will get into that, I suspect, a little later. Now your conclusion was that this area, when you reached your conclusion in July, 1945, had a fair market value of $6,000, and yet you had not at that time a single other market sale of comparable property with which to fix a market value, an actual sale value?

A. There had been no sales of similar lands in the vicinity of Vicksburg along the waterfront at that time that I considered applicable, yes, sir.

Q. Then in fairness, Mr. Leggett, shouldn't we say this $6,000 figure is just your opinion of value—period —with no reference to market?

A. It would be an opinion of value in any event.

Q. That is right.

A. In other words, market, or no market. (R. 48-51)

His earlier attempt to disparage the value of Petitioner's land because it was located on a 6½-foot channel turned out to be a feeble attempt at best.

> Q. Now I want to know how low, what stage of the water have you still got 6½ feet?
>
> A. That is engineering information I was given. The only way you could base that would be to go to minimum stage in the Mississippi River—refer to the minimum Mississippi River stages and the project I assume was based on that stage when it was desired to carry 6½ feet in the channel.
>
> Q. So when you get ordinary water and highwater, the channel is much deeper?
>
> A. Yes, sir, considerably so, to the point where I would say roughly fifteen days out of the year, we can get definite information on it, fifteen days more or less out of the year it is hazardous to navigate the canal.
>
> Q. Isn't it true, Mr. Leggett, that when barges can come up the Mississippi River they can come up to this area in controversy, the barges like you see in the picture, and then when it is hazardous to come up the Yazoo, it is hazardous to navigate the Mississippi itself?
>
> A. Yes.
>
> Q. So that wouldn't make much difference, would it?
>
> A. Not materially, no, sir (R. 61-62).

David L. Smith, also an appraiser for the Government (R. 93), who put a value of $7,500 on the property, suggested that the condemned area was more or less comparable" with the Moore Tract (R. 98) located on the main channel of the Mississippi River below the mouth of the Yazoo River with no rail facilities at all (R. 127), but frankly admitted: "Well, there is a great deal of difference between the sites" (R. 97). After admitting vital differences between the condemned area and every other industrial site he had found, and after evading for about 45 minutes answering the simple question if he had found "a

ingle spot comparable to the area in controversy" (R. 131), in response to a question by the Court he finally admitted that he knew of no such site (R. 132).

Q. Now I don't think you have told us yet of a single spot comparable to the area in controversy which is not protected by the levee from the mouth of the Yazoo up the Yazoo Canal through the entire Vicksburg front and on up above the area in controversy lying between the railroad and the river, that has this elevation, with the track facilities and the highway. Everything you have pointed out doesn't have those things. Have you been able to find one that meets the question the Court repeated to you?

The Court: Let me ask a question now, gentlemen. As I understand it—and I want a yes or no answer, because we have lost about 45 minutes, and you can then go into any other areas that are slightly or reasonable comparable that you haven't gone into, but is there another spot identically like the one that has been condemned?

The Witness: I know of no four-tenths of an acre of high land lying west of the railroad along the canal, Judge, no.

The Court: Very well. Now then, are there any other spots about which you haven't already inquired into? You may do that, but, gentlemen, if you expect to finish this case this week, you are going to have to quit repeating so much testimony.

Mr. Williamson: Well, that would have answered my question if he hadn't limited it to four-tenths of an acre.

Q. Forget the acreage. Is there any other area lying between the railroad and the canal of any size lying between the railroad and the Yazoo River from the mouth of the Yazoo as far north as you want to go that has an elevation, and on the same level free track facilities, the highway, as well as a quiet harbor? You said there is a good harbor in the Mississippi River, but

I say a quiet harbor comparable to Lake Centennial. Are there any other available areas or is there any other available area that has those characteristics that you know about?

A. I know of no other site identical to this site.

Q. That doesn't answer my question. As the Court suggested, I wish you would just say yes or no to my question.

A. It seemed to me that would answer it.

Mr. Williamson: You see, Your Honor, I didn't ask him "identical".

The Court: I am going to call it "the canal". Let's all refer to Lake Centennial as the canal hereafter, and everybody will understand what you are talking about.

By the Court:

Q. On the canal, is there any other spot that is like the one that has been condemned with reference to nearness to the railroad, nearness to the highway and practically the same elevation, and not protected by the levee?

A. I don't know of a site, no, sir (R. 131-132).

William L. Nicholson, a retired real estate agent who couldn't remember how many years it had been since he had handled the sale of a piece of industrial property, suggesting it may have been 25, 30, or 40 years (R. 139-140), and who had never handled a piece of property on the river front (R. 141), for the Government valued the condemned area at $6,000 (R. 138). But on cross-examination he admitted that he knew of no property up and down the river front comparable to the condemned area if its industrial advantages were to be considered (R. 153). He admitted that it would take considerable expense (R. 152) to make other property which he mentioned comparable to the condemned area.

When Mr. Nicholson was pressed to tell the jury the

similarities of the Moore tract with the area in question he more successfully pointed up the differences admitting that the Moore tract had no rail facilities (R. p. 147).

Q. Now there wasn't any of the property that you compared to this that was on the west of the railroad, at an elevation of 105 feet mean Gulf level, had a spur track, was on calm waters or on the canal, and was adjacent to Highway 61, immediately adjacent to it, I mean adjoining Highway 61? You didn't compare any properties like that, did you, sir?

A. No.

Q. Is there any other property like that, sir?

A. The way you hammer at this, I don't think there is any other property in the world compared to this thing.

Q. Is there any other property up and down the river front comparable to it, with the same advantages and disadvantages?

A. With the road right at the front gate?

Q. Yes, sir.

A. And your railroad on one side?

Q. And river on the other, or canal?

A. Boy! You have got a wonder there.

Q. I thank you, sir. That is what we think (R. 152-153).

Sam Kleisdorf, a real estate and insurance agent familiar with land values only within the City of Vicksburg (R. 155)—(The condemned area is not within the City limits but North thereof (R. 156)—for the Government valued the condemned area at $8,062.50 (R. 157). But he knew of no comparable property which had been sold (R. 164) which he could use as a basis for establishing market value. He did not consider the value of the site for an oil terminal (R. 168). He knew of no two pieces of land that are exactly comparable (R. 169). He had not heard of any offers or sales or suggestions of price on any property in the vicinity

of the condemned area (R. 169). Market value is established by supply and demand (R. 170). Knowing of no transactions in property of the kind of the condemned area the value fixed by the witness was merely his judgment as to what it was worth (R. 171-172).

Q. Now you say that you compared other properties with this particular piece of property. Just what pieces did you compare with the Anderson-Tully Tract?

A. Well, there were about three or four tracts south —I would say in the southern section facing on the canal and one below the canal on the river itself.

Q. And you believe those particular properties to be comparable in *many* respects to the Anderson-Tully Tract?

A. Each in *some* respects. (R. 157-158.)

* * * * * * *

Q. What other property did you take into consideration?

A. The properties taken into consideration were this Hill City Compress, which is Union Compress, property, and this property, and then a small piece in here, a triangular piece.

Q. (Pointing to map) Here?

A. No. A triangular piece north of Anderson-Tully, a tract right in here I think it is.

Q. Well, now, when you say you took those into consideration, what do you mean by that? The properties haven't been sold, have they?

A. No, they haven't been sold. For comparison as to what they represent in use.

Q. Do you know whether or not any of that land is available for purchase, available for sale?

A. It is vacant, and I imagine anything has a price on it and can be bought, and my understanding in all railroad property, any time they can have an industry that will produce money for them, that property can be leased or purchased or used or rented.

Q. Now, Sam, if I would tell you as a matter of fact

that this, instead of being the property of the Illinois Central Railroad Company, was the property of the Merchants Bank and Trust Company of Vicksburg as trustee for the Marquette Cement Company, you would say that property is probably not available?

A. I didn't say it was available; I said it was vacant. (R. 163-164.)

* * * * * * *

Q. What use did you consider the property would be put to at its highest and best and most available use?

A. Shop, warehousing, maybe marine repair shop or something of that type.

Q. Did you take into consideration the fact that it was now being used by the Government and had been used a good many years as an oil terminal?

A. No, I didn't consider it as an oil terminal. No, I didn't consider it for that purpose.

Q. Well, as an oil loading or unloading or whatever you term it—anything other than a tank farm?

A. No.

Q. You didn't take that into consideration?

A. Not as any type of oil storage, no.

Q. Did you take into consideration the fact that it would be used to load and unload barges and that the oil could be stored in the barges out in the river there, which is also done now by the Government?

A. No, I did not take into consideration storing oil on the river at all. (R. 168-169.)

Lawrence Hennessey, a Vicksburg insurance and real estate agent (R. 153), for the Government valued the condemned area at $8,100 (R. 174). But on cross-examination he too was finally forced to admit that he did not know of any other property in the Vicksburg area which had the characteristics of the condemned area (R. 188-190).

One sale to which the witness referred by way of comparison was that of the Dornbusch property, 1200 feet of low land along the canal North of the Government Fleet (R.

176) subject to overflow and upon which nothing could be built without using piling (R. 193-194). Witness did not know how much it would cost to build the Dornbusch property up to the elevation of the condemned area (R. 192).

Another sale to which witness referred for comparison was the tract bought by Anderson-Tully Company itself, immediately South of and adjoining the condemned area for which the Company paid $2,550 (R. 177). As will be hereinafter shown, the Anderson-Tully Company bought this tract in self defense when the Government took the condemned area (R. 420), and it will cost Anderson-Tully Company more than $100,000 to make that site equivalent to the land taken from it by the Government (R. 347-371).

The third and final sale to which the witness referred was the Moore Tract on the main channel of the Mississippi River, which all the witnesses agree had none of the unique characteristics heretofore listed as being enjoyed by the condemned area. Even Mr. Hennessey can only say that the two tracts could probably be considered comparable in many respects, but "they are certainly not identical property at all". He continues: I don't believe I know of any identical properties anywhere (R. 178).

> Q. I am talking about the condemned area. Is there any other property of the same ground level as that, not behind the seawall?
>
> A. I don't know of any.
>
> Q. As a matter of fact, there isn't any?
>
> A. I couldn't say that. I don't know of any.
>
> Q. Is there any property like that that is immediately adjoining the railroad?
>
> A. Well, I was speaking entirely of comparable property.
>
> Q. The same level as this and not behind the seawall and property that has got a highway connection?
>
> A. All these properties have highway connections.
>
> Q. I mean as close proximity as this.

A. Of course, Levee Street is not a highway, but it is utilized for the same purpose, and it is just as close as Highway 61 to this property, though it is not a U. S. highway.

Q. You still have to go up and down extremely high hills to get to the U. S. highway?

A. At one end you do, at the other end you don't. It depends on which way you are going.

Q. In other words, Nick, to be frank and fair, that is the only property you know of that has all of the characteristics that it does, isn't it?

A. Well, of course, the other properties, they are just as unique maybe.

Q. Answer the question yes or no. Do you know of any other property that has all of the attributes and everything that this property has to it that is west of the highway and adjoining both the railroad and the highway, above the high water mark, and is not behind the seawall or levee, that has river front, canal frontage?

A. Well, of course, west——

Q. Answer yes or no, if you can.

The Court: In other words, is there any other property exactly like this on the canal there that is vacant?

A. On the canal—is that what you mean?

Q. From the National Cemetery right down to the mouth of the canal?

A. There are so many other properties.

Q. I mean just similarly situated to this.

A. Similar with the exception of behind the seawall.

Q. There are always exceptions. Is there any property like it without stating any exceptions? With as much ground, with as much or more?

A. You mean level ground, Bob?

Q. Level ground, above 105 feet mean Gulf level.

A. I don't know of any, no. (R. 188-190).

Frank J. Groome, a Vicksburg real estate agent, who had not paid a real estate privilege license for a number

of years and who had never handled the sale of an industrial site (R. 202), for the Government "put a figure of $6,000" on the condemned area (R. 195-196). The only sale he could find which he "thought would show comparability" was the sale of the Moore Oil Terminal, now owned by Cities Service on the main channel of the Mississippi River, below the mouth of the Yazoo River, a 1.06 area tract which sold for $10,000 (R. 196-198). That property was entirely cut off from railroad facilities and was 88 feet below United States Highway 61, so that oil products landed at the site were pumped to the top of the hill on Highway 61 where they were loaded into trucks (R. 198-199).

This witness admitted that his valuation of the condemned area was much cheaper than the same area could be bought on Cherry Street in Vicksburg for residential purposes. (R. 203).

> Q. And what were your reasons for putting this price on the property as being a fair market value? On what did you base that?
>
> A. Based on—I didn't find, I believe, but one other sale that I thought would show comparability, and I based it on that partly and also partly on just the general situation there and what I thought the thing would bring in a sale, as you described it for a willing purchaser and a willing seller. (R. 196).
>
> • • • • • • •
>
> Q. Now you mentioned a few minutes ago that you took into consideration a comparable sale. What sale was that that you speak of?
>
> A. The only one I could find as a sale was the Moore Oil Terminal now owned, I think, by the Cities Service people. I am not sure of the ownership, now, but it has been referred to as the Moore Oil Terminal below the Refuge Cotton Oil Mill on the Mississippi River.
>
> Q. And that sale comprised what acreage?

A. About an acre and a half, I believe it is, or an acre and some fraction, I don't remember exactly.

Q. And the purchase price for that property was what?

A. Ten thousand dollars.

Q. Ten thousand dollars. Did you figure what that would be per square foot?

A. I think it figured out to be about 21¢.

Q. Are there any rail facilities near the Moore property?

A. No, sir. They are cut off from rail.

Q. They come up to the back of that property, do they not?

A. Adjoin on the south the Refuge Cotton Oil Company property, and they have rail facilities. If they could ever get a right-of-way through the Refuge Cotton Oil property, they would have rail facilities. I don't know whether that has ever been tried.

Q. They truck products out?

A. Pump them to the top of the hill on Highway 61 and they are loaded into trucks. (R. 197-198).

• • • • • • •

Q. I said you have here on the witness stand placed a valuation on one of the four admitted industrial sites left on the Yazoo Canal and the Mississippi River in the Vicksburg area at a smaller value than residential lots on Cherry Street, one of the main streets of Vicksburg?

A. That is right. (R. 203-204).

Leo M. Odom, the Government's last witness, had for less than two years been a consulting engineer at Baton Rouge, Louisiana. Prior to that time he had been with the Army Engineers (R. 206-207). For the Government he gave his expert opinion that the best use for the condemned area would be as a small oil terminal or docking facilities (R. 208). It could be used for a small tank farm (R. 217). All the remaining vacant industrial property the witness

could find were four small parcels or tracts behind a levee (R. 211, 216). (These are the same four tracts discussed and distinguished by many witnesses.) Mr. Odom could think of no other comparisons (R. 220).

In his entire search for the Government, he could find no property that was comparable to the condemned area by being on the calm, quiet water of the Yazoo Canal, adjoining a railroad, adjoining a highway, above flood stage, and not behind either a levee or seawall (R. 224).

It is significant that the Government did not ask this witness to express his opinion as to the value of the condemned area.

> Q. Now let me ask you this one question, please, sir. Answer it yes or no. Did you find any property in the survey that was made by you that was comparable to this property in that it was on the Yazoo Canal, which is calm, quiet water, adjoined a railroad and adjoined a highway and was above flood stage and not behind either a levee or a seawall? Answer yes or no. You can do it.
>
> A. Well, no, I didn't find an exactly similar piece of property.
>
> Q. Now getting back to this Moore Terminal property, there are no rail facilities there, are there?
>
> A. No.
>
> Q. No highway facilities there, are there?
>
> A. Well, their property goes on back to the highway. I believe that is where they load their trucks.
>
> Q. And there are no trucking facilities down to what is termed the Moore property, are there? In other words, you have to go down a long, winding, gravel road?
>
> A. Apparently they don't run heavy trucks down there.
>
> Q. That would be an impractical proposition?
>
> A. I should think so, unless the road was fixed up better. (R. 224).

Notwithstanding the complete absence of contemporaneous comparable sales of similar property by which a "market value" could be established, the Court erroneously refused to permit the condemnee to prove what it would cost to reproduce an *equivalent area* thereby putting itself *in as good a position pecuniarily as it would have occupied if its property had not been taken.* The Court repeatedly told the jury that Petitioner was "entitled to the full and perfect equivalent in money of the property taken, so that (it) may thereby be put in as good a position pecuniarily as (it) would have occupied if (its) property had not been taken" (R. 428, 430); but inconsistently the Court then refused to permit the jury to hear any practical standard by which to measure this "full and perfect equivalent in money". Petitioner repeatedly offered to show exactly what it would cost to replace the taken property, but the Court consistently rejected every such effort (R. 231, 299, 319, 328, 346, 352, 369, 371).

In the absence of the jury, Petitioner offered the following evidence:

St. George Richardson testified: As a construction engineer of long experience I was requested to reproduce as cheaply and as practicably as possible an area equivalent to that taken by the Government in this case from Anderson-Tully Company. I have made a very careful and accurate survey and estimate to determine what that cost would be (R. 298-299).

I made this survey in November, 1945, for the purpose of ascertaining at what cost the area which was taken by the Government could best and most reasonably be reproduced or replaced (R. 347). I undertook to find how cheaply I could produce an equivalent to the condemned area as it was on July 1, 1945. I found that the area that was the easiest to fix in the same condition was the area

immediately adjacent to the area taken. It could be done most cheaply there because the toe of the new fill would naturally abut the toe of the old fill. There would be an overlap which would be a saving of yardage (R. 348).

My Exhibit is a map of the actual survey which I made of the condemned area in 1945 (R. 279-282). I now introduce Richardson's Exhibit 4-A (R. 350) which also shows an area corresponding to the condemned area, of exactly the same acreage and exactly the same frontage along the railroad. The average width of that area would then be 36 feet outside of the railroad right-of-way. This reproduced area corresponds closely with the location of the river side of the condemned area. I made a very careful cross-section, and used the same area on top outside of the railroad right-of-way as the condemned area, and I used approximately the same slope as I found in the condemned area. Richardson's Exhibit 4-A correctly shows the proposed reproduced area which would be equivalent to the condemned area (R. 348-350).

I could not find any location along the river front of Vicksburg in which this equivalent area could be reproduced as cheaply, or cheaper, than the equivalent area shown on this Exhibit. Immediately upstream North of the condemned area is the Government Engineer Depot which of course is not available. Just North of that is a small area that could possibly be prepared but it would be far more expensive than the area I have worked on. The further upstream you get the more expensive would be the cost of reproduction or replacement (R. 350-351).

The cheapest and most reasonable cost of replacing or reproducing the condemned area as shown by my study is $84,362.22 (R. 352-354). This itemized estimate, which I file as Exhibit 7, includes the earthen fill plus the railroad facilities that the condemned area enjoys. It does not include the piling structure that is used for an oil dock, nor

ny of the buildings. It is a reproduction of only the aked land and the railroad facilities. Nor does it take nto consideration the value of the land on which the equivaent area is reproduced (R. 353-354).

(The actual cost of the land on which the equivalent area was reproduced by Mr. Richardson was $2,550.00 (R. 177).) The structural fixtures on the land which Mr. Richardson excluded, exclusive of buildings, on July 1, 1945, were worth $20,825 (R. 356). Thus the testimony of Mr. Richardson fixes the cheapest replacement cost at a total of $107,737.22. The Court rejected this evidence (R. 371).

B. C. Tully corroborated the testimony of Mr. Richardson, and was of the opinion that the above figures were "conservative" (R. 355-356).

H. R. Davis, John S. Murphy, and L. E. McCulloch, independent engineers of the Illinois Central Railroad, made an independent study of the cost of replacing the condemned area as of July 1, 1945 (R. 357-367), their estimate being $87,546.89 as they found the condemned area when they surveyed it shortly before the trial (R. 358); but their estimate of reproducing the property as Mr. Richardson had found it in 1945 aggregated $81,657.80 (R. 360-362). Adding the value of the land purchased by Anderson-Tully Company for reproduction use (R. 177) and the value of the fixtures on the condemned area when taken July 1, 1945 (R. 356) makes the total cost of reproduction as estimated by the railroad engineers aggregate $105,057.80.

The Court rejected this, and all other evidence tending to show the cost of reproducing or replacing an area equivalent to that taken by the Government (R. 371).

By refusing to admit any evidence tending to show the cost to the owner of a necessary replacement of the property taken, the trial court ignored the value of the property to the owner Anderson-Tully Company. In the absence of a sufficient number of sales of similar property, the jury

was entitled to consider any element of damage which would tend to show the actual loss to the Petitioner.

As the preeminently wise, just and scholarly Mr. Justice Holmes observed in his often quoted truism anent the "just compensation" guaranteed by the 5th Amendment to our Constitution:

> "It deals with persons, not with tracts of land. And the question is, What has the owner lost? not, What has the taker gained?"
>
> *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 194-195, 30 S. Ct. 459, 54 L. ed. 725, at 727.
>
> *United States* v. *Chandler-Dunbar W. P. Co.*, 229 U. S. 53, 81, 33 S. Ct. 667, 57 L. ed. 1063 at 1080.

This just principle is well settled as a cardinal rule of law in eminent domain proceedings.

Mr. Orgel in his authoritative work on *"Valuation Under Eminent Domain"* writes:

> "'Just compensation' say the courts of this country including the highest court, is a compensation sufficient to make good the Loss of the Owner. In the words of Mr. Justice Butler, the owner is 'entitled to the full money equivalent of the property taken, and thereby to be put in as good a position pecuniarily as it would have occupied, if its property had not been taken'.
>
> "A corollary to this proposition would seem to be that, when property is taken, its value to the owner is the only strictly relevant value, and that market value is acceptable only to the extent that it may be taken as a rough, practical measure of value to the owner."
>
> Orgel, 146, Sec. 45.
>
> "Speaking for the Supreme Court in a leading condemnation case, Mr. Justice Lurton said:
>
> "'The value of the property to the government for its particular use is not a criterion. The owner must be compensated for what is taken from him; but that

is done when he is paid its fair market value for all available uses and purposes.'

"And Mr. Justice Holmes said in another case:

"'The question is, What has the owner lost? not, What has the taker gained?'"

This established principle was recognized by the Supreme Court of the United States as late as 1949 when Mr. Justice Frankfurter stated:

> "But when the property is of a kind seldom exchanged, it has no 'market price' and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights." *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 69 S. Ct. 1434, at 1438.

Of course this evidence is only relevant "as bearing on what a prospective purchaser would have paid" (*United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, December 12, 1949, 70 S. Ct. 217, at 221); but for this purpose the rejected evidence was most significant and of the highest importance to the owner.

We hope this Court will now apply this essential principle of fairness to the uncontradicted "peculiar circumstances" and facts in the case at bar. Otherwise Petitioner will be denied "just compensation" to make it whole from the actual loss which it sustained when the Government took its only available water-rail-highway terminal; and to that extent justice will thereby certainly be thwarted.

The loss suffered by the Petitioner, Anderson-Tully Company, by reason of the condemnation of the site in question was tremendous. Through the Patton-Tully Transportation Company, a wholly owned subsidiary of Petitioner, the Petitioner is engaged in a general towing and river transportation business. The transportation company tows logs on the river for the Anderson-Tully Company mills of

which there are five in the City of Vicksburg (R. 374). It has been towing oil on the river since 1926. The company has an investment of nearly $2,000,000 in equipment for towing oil and logs (R. 373). The company owns its own barges, tugs and power boats. The Petitioner declined to renew its lease to the Government which expired June 30, 1945 (R. 378), because the market demand and the company's business need for the site had become acute. Even at the time of the trial, two of the company's mills were shut down solely for lack of such transfer facilities as the condemned area would have afforded. Ninety per cent of the company's timber is riparian to the river and must be transported on the river to the company's mills on barges or by rafts. A transfer terminal from river to rail, or from water to highway where the logs can be trucked, or in other words a terminal site such as the condemned area, is vital to the operation of the company's business (R. 378).

Mr. Tully testified: The most profitable use of the condemned area would be for an oil terminal. It is ideal for that purpose. It is not necessary to have a lot of storage. That can be handled very easily. You can do just exactly what the Government is doing now—use barges for storage with just little surface tanks on top of the hill. The profitable terminals all up and down the river are the small terminals who handle it that way (R. 379-380 and 417).

The demand for such terminal sites greatly exceeds the supply which makes for "a very high price" (R. 380). You can name your own price (R. 382). In the last ten years I have had twenty requests for assistance in locating such terminal sites. People know that I am familiar with this area (R. 380).

During 1944, a short time before the Government took it, I was offered $45,000 for this identical property but declined the offer "because it was worth more money" (R. 381).

"I wouldn't take $100,000 for it" (R. 383). (The Court sustained the Government's objection to this testimony of Mr. Tully and told the jury to "completely eradicate it from your mind"—R. 381).

The Court of Appeals held that no error was committed by the Court below in refusing to permit the Petitioner to present evidence as to the cost of reproducing or replacing the condemned site for the reason that "the character of the evidence sought to be adduced was not 'reproduction' evidence in the usual sense, that is relating to the cost of reproducing structures of other improvements to the land, but was evidence as to the estimated cost which would be incurred if someone wished to fill and otherwise improve an adjacent tract of land in order to make it physically identical to the land taken. This evidence was properly excluded" (R. 468).

This Court has time and again taken note of the fact that a strict adherence to the market value theory does not always and in every instance afford the owner just compensation as provided by the 5th Amendment of the Constitution. In the case of *Hanson Lumber Company* v. *United States*, 261 U. S. 581, 43 S. Ct. 442, 67 L. Ed. 809, this Court permitted evidence to go to the jury as to the cost of digging a canal on lands which were condemned. Here we have a specific instance of the permissible use of the cost of reproducing or replacing a site where no buildings or structures were involved. A portion of the opinion of the Court is as follows:

> "The court instructed the jury to consider what it did cost and what it would cost now to dig the canal, the reasons that induced the company to make the contract, and that in reaching a verdict, they were not bound by the $65,000 agreed upon, and might find an amount greater or less than that. The objections urged against the charge are not well founded.

"The evidence tended to show that the original cost of the canal was $65,000, and that it would cost $152,000 to reproduce it. There was evidence disclosing the size of the canal, and its suitability for use, together with the condition of the property. It cannot be said the verdict for $65,000 is without support. New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 75, 36 L. Ed. 71, 80, 12 Sup. Ct. Rep. 356, 8 Am. Neg. Cas. 690."

In the *Kimball Laundry Company* case *ante* the Court held that the jury was entitled to consider the loss to the condemnee of its established trade routes, an item which clearly was not associated with the market value of the laundry equipment as such.

We earnestly contend that in the absence of similar sites in the vicinity of Vicksburg, Mississippi, that the evidence of what it would cost to reproduce such a site is entirely appropriate to be considered by the jury. The Court held in the case of *United States* v. *Miller, et al.*, 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 337:

"The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.

"It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the 'value', the 'market value', and the 'fair market value' of what is taken. The term 'fair' hardly adds anything to the phrase 'market value', which denotes what 'it fairly may be believed that a purchaser in fair market conditions

would have given', or, more concisely, 'market value fairly determined.'

"Respondents correctly say that value is to be ascertained as of the date of taking. But they insist that no element which goes to make up value as at that moment is to be discarded or eliminated. We think the proposition is too broadly stated. Where, for any reason, property has no market, resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. It is usually said that market value is what a willing buyer would pay in cash to a willing seller. Where the property taken, and that in its vicinity, has not or in significant amounts, the application of this concept involves, at best, a guess by informed persons."

The holding of the Court of Appeals is in direct conflict with holdings of other Circuit Courts of this country as evidenced by the case of *Clark* v. *United States,* 155 F. 2d 157 (Eighth Circuit) wherein the Court had under consideration the condemnation of a tract of land which had been developed by the owner as a recreation area for his employees. The trial court would not permit the owner to introduce evidence as to the separate value of the improvement, limiting the testimony to opinion value as to what constituted the market value of the property. The Court commented on the fact that there had been no recent sales of similar property in the vicinity:

"Here it appears that there had been no recent sales of similar property in the vicinity of this land and it can not be said that the property in a technical sense had a market value. In such circumstances the opinion of expert witnesses unsupported by other facts and circumstances is of little value, and resort should be had to such other available evidence as may throw light upon the question of value. As said by the

Supreme Court in United States v. Miller, supra, 'Where, for any reason, property has no market value, resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. It is usually said that market value is what a willing buyer would pay in cash to a willing seller. Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best, a guess by informed persons.'

"It is true that much is left to the discretion of the trial court in admitting evidence as to the value of the property taken in condemnation proceedings. Ramming Real Estate Co. v. United States, 8 Cir., 122 F. 2d 892; Union Electric Light & Power Co. v. Snyder Estate, 8 Cir., 65 F. 2d 297. The discretion, however, is not an arbitrary one, but must be exercised judicially, and *where, as here, there can not be said to be a market value the inquiry may properly cover a wide scope.* In discussing the question of evidence as to value in Hard & Rand, Inc. v. Biston Coffee Co., 8 Cir., 41 F. 2d 625, 627, we said: 'Evidence of the cost, selling price, *replacement value,* depreciation, use value, junk value, location of the property, local demand for it, and many other things may be shown.'

"The property was highly developed and improved both for stock farming and for recreation purposes and the improvements were well adapted to such purposes. The property is located near a metropolitan center and the development of recreation facilities in that area would seem to have substantial basis as a business venture. In such circumstances evidence as to the intrinsic value of the improvements should, we think, have been admitted as an aid to the jury in arriving at a decision of the ultimate question of just compensation for the property taken. (Many cases cited) . . .

"In such circumstances to refuse to permit the jury to be informed as to the value of the structures is an

abuse of discretion. It is worthy of note that the structures and improvements were not only numerous but varied in character and some of them at least were unusual in character. For example, to inform the ordinary juror of the construction of a dam creating a lake with an area of 15 acres and the building of a peninsula into the lake 4 feet above the water some 300 or 400 feet wide, would give him but little information as to the value of the property as improved by the construction of this lake. Other improvements were equally unusual and more or less technical in character, to be understood by a trained civil engineer rather than by the layman making up the jury."

Similar evidence has been permitted by other Courts of Appeal throughout the country, and the ruling of the Fifth Circuit is directly in conflict with these other holdings.

"The Cost of Reproduction has a tendency to show present value, and we think this testimony admissible in condemnation cases (cases cited) . . . . 'Where value is an issue, the inquiry may properly be allowed to take a wide scope. Evidence of the cost, selling price, Replacement value, depreciation, use value, junk value, location of the property, local demand for it, and many other things may be shown. Many elements properly enter into the determination of "fair value", and evidence bearing on the question may be admissible, although it may have but little weight. Counsel could more properly argue against the weight of the evidence than its admissibility.'"

Union Electric Light & Power Co. v. *Snyder Estate Co.*, (8th Cir.) 65 F. 2d 297, at 304-305.

"As a part of its proof to establish the value of the property taken, defendant offered testimony of certain experts as to the Cost of Reproduction, less depreciation. . . . We have already held that both the building and the fixtures constituted part of the realty. The property taken was the land as enhanced by the value of structures and fixtures. Manifestly, evidence as to

the cost of reproduction, less depreciation, was proper evidence to be taken into consideration by the jury in determining the value of the property as a whole. (Cases cited.)"

United States v. *Becktold Co.*, (8th Cir.), 129 F. 2d 473, at 477-478.

Petitioner's requested Instruction 7, refused by the Court (R. 440), was based upon a very fine instruction to the jury on "evidence regarding reproduction costs" found in the case of *United States* v. *Wise*, in which the Court, among other things, said:

> "There has been a great deal of testimony, not only from the witnesses for the Government but from the witnesses for the landowner, with respect to the character and condition of the buildings and other improvements, additions and installations on this land, and the original cost and the Reproduction or Replacement cost of all those additions to the land. . . . As I have tried to make clear as we have gone along, evidence of that character is admitted for the purpose of informing the jury of all the physical facts and circumstances surrounding the property being taken and the improvements thereon, the condition of those improvements, their general utility with respect to the use of the land, and all matters of that kind. . . . But, as I have already instructed you, you are to consider every physical fact and circumstance and everything that is on the land and under the land that has been added to it, for the purpose of arriving at a final figure which, in your opinion, based upon all the evidence, will be just compensation for the single piece of property taken. . . . it is to be viewed as the taking of a single piece of property—viewed much in the same light as a shrewd, able purchaser who was interested in that property would view it and summarize it if he had gone there with the serious intention and the ability of finally acquiring the property. He would very probably make a breakdown of the physical condition of the buildings, of all the

piping and everything that was on the land, . . . but when he finally came to determine what he would pay, it would be a single figure. So this is a single taking of a single piece of property, composed of all the elements about which the witnesses have testified during the course of the trial. . . . It is your duty to consider all of these elements that enter into the picture, all that contribute to make the property valuable, all, if there are any, that detract from it, and finally, weighing all those elements, determine what is just compensation for the single piece of property that has been taken by the Government. I think that makes clear to you the distinction between determining what is the replacement cost . . . and the real issue that is behind that, and the purpose behind determining replacement cost, or original cost, or any of those things is to aid you in determining whether or not the existence of those (additions) on the land contributes anything to the fair market value of the whole, and, if it does contribute to it, how much does it contribute? That applies to each and every structure that was on or in the property."

United States v. *Wise* (4th Cir.), 131 F. 2d 851, at 852-853.

In *Westchester County Park Commission* v. *United States* (2d Cir.) 143 F. 2d 688, judgment below was affirmed where "witnesses for the county estimated that the fair and reasonable cost of filling in the lands acquired and the building of the seawall was $14,000" (p. 690).

"Where value is an issue, the inquiry may properly be allowed to take a wide scope. Evidence of cost, selling price, Replacement Value, depreciation, use value, junk value, location of the property, local demand for it, and many other things may be shown. Many elements properly enter into the determination of 'fair value', and evidence bearing on the question may be admissible, although it may have but little weight."

Hard & Rand v. *Biston Coffee Co.*, (8th Cir.), 41 F. 2d 625 at 627.

For the reasons shown Petitioner respectfully submits that the action of the two lower Courts herein in refusing the introduction of the evidence with reference to replacement or reproduction value has deprived the Petitioner of its just compensation, that the ruling of the Court of Appeals for the Fifth Circuit is in conflict with rulings of other Circuit Courts of Appeal of this country as shown, and that the ruling is in conflict with prior decisions of this Honorable Court. For all of these reasons Petitioner respectfully prays that this Honorable Court grant to it a writ of certiorari whereby this Court can accept, review and determine this controversy.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 171

ANDERSON-TULLY COMPANY, OWNER OF 8 ACRES OF LAND IN WARREN COUNTY, MISSISSIPPI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court did not write an opinion. The opinion of the Court of Appeals (R. 466-472) is reported at 189 F. 2d 192.

JURISDICTION

The judgment of the Court of Appeals was entered May 16, 1951 (R. 472). The petition for a writ of certiorari was filed July 3, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

1. Whether, in proceedings to condemn a tract of land, evidence of the cost of creating its equivalent by filling and otherwise improving adjacent property is admissible.

2. Whether the United States, in proceedings to condemn fee title to land which it occupied under a lease giving it the right to remove fixtures, is obliged to compensate the landowner for the value of such fixtures, as well as the value of the land condemned.

STATEMENT

On July 31, 1945, the United States, at the request of the Secretary of War, instituted proceedings to condemn approximately eight acres of land in Warren County, Mississippi, owned by petitioner, for use in connection with the control of floods on the Mississippi River (R. 2-11, 36). The land, which had previously been leased to the Government, is located on the east bank of the Yazoo Canal, approximately a mile and a half north of the City of Vicksburg (R. 39). About 3½ or 4 acres of the tract are subject to annual overflow, and stay under water for a considerable portion of the year. The remaining portion of the tract to the west is below standard low water and extends out to the bed of the stream. Prior to the time the Government leased this land, it was practically all subject to overflow. The eastern portion of the tract, consisting of about 0.4 of an acre, or 17,000 square feet, is now fast land, not subject

to overflow. About the year 1933, the Government, wholly at its expense under a Works Progress Administration project, placed 47,000 cubic yards of earth on the tract, making the 0.4 of an acre of fast land (R. 41, 224-227, 284-285).

The United States was in possession of this land under various leases and extensions from petitioner continuously from October 27, 1924 to June 30, 1945, for use by the Corps of Engineers (R. 226, 229). During this time, it installed a structure extending from the fast land out into the canal, designed to carry pipe lines for use in pumping oil from boats tied up in the canal to railroad cars, and two warehouses on the fast land which were used for storage purposes (R. 52-53, 287). The lease under which the property was held prior to the institution of this proceeding, dated July 1, 1941, provided for a rental of $60 per month, and contained a provision for yearly renewals, the latest not to extend beyond June 30, 1945. This lease and the preceding one, dated July 1, 1937, provided that additions and structures placed upon the premises should remain the property of the Government and might be removed prior to the termination of the lease (Ex. "Government A" and "Government B", R. 229).

At a trial before a jury, the Government produced six expert witnesses, being appraisers and real estate brokers who were familiar with property along the canal and river. Their valuations

ranged from $6,000 to $8,100, based on the highest and best use to which the property could be put, which was the location of an industrial installation or a small oil terminal. They gave consideration to the availability of industrial sites along the waterfront, public utilities and transportation facilities; and also to a sale of a tract of land on the Mississippi River about two miles from the condemned tract which they considered comparable in many respects, and superior in some, to petitioner's land (R. 40-44, 48-49, 70-71, 89, 96-98, 116-127, 131, 138-139, 142-148, 151, 157-164, 168, 174-185, 196-199, 204, 208-211, 219, 242-243).

Six witnesses testified for the petitioner that they would not attempt to fix a value beyond the statement that the property had the advantage of being on a quiet harbor, and the 0.4 acre of fast land was on a level with rail and highway facilities which made it unique and noncomparable. A seventh, a real estate broker, valued the land at $45,000 for use as a small high-speed river-rail terminal (R. 218-219, 238-240, 251-253, 255-257, 258-262, 293, 324-326, 331-335, 343-344). Petitioner's president testified that petitioner owns a number of sawmills at Memphis, Tennessee, and Vicksburg, Mississippi, and owns a transportation company which operates a fleet of boats and barges on the Mississippi River; and that it declined to renew the Government's lease which expired June 30, 1945, because it needed a landing and fueling

place for its fleet (R. 372-378). He stated his unwillingness to sell (R. 413) and placed a value of $85,000 to $100,000 on the property, for use as a small oil terminal (R. 379-384).

Three of petitioner's witnesses, in the absence of the jury, testified over the Government's objection (R. 351-352) as to "the cost of replacing or reproducing the condemned area." This evidence did not relate to the tract of land condemned. It represented the cost of bringing another tract of land owned by the petitioner adjacent to the condemned land to a comparable physical situation as that of the land condemned. These estimates were $81,657.80 (R. 361), $84,362.22 (R. 354), and $87,546.89 (R. 360, 366). Similarly, petitioner's president testified, in the absence of the jury, that he estimated the reproduction cost of the structures on the land at $21,500, and the depreciated value at $20,825 (R. 356). The trial court ruled that under the lease the structures remained the property of the Government (R. 228).

The jury returned a verdict for $12,500 and an order confirming the award was entered (R. 445-448). The Court of Appeals affirmed the judgment, holding that the United States had established a market value and that petitioner's evidence as to the cost of reproducing the land was properly refused by the trial court. It further held that, upon condemnation of the property, the Government was not required to pay more than the

value of the land without the improvements (R. 466-472).

ARGUMENT

1. The decision of the Court of Appeals is correct and does not conflict with any applicable decision of a federal court. Petitioner's contention is simply that the Government should pay, as part of just compensation for the land condemned, the cost of creating a tract of land physically equivalent to the one taken. The authorities relied upon (Pet. 11-12, 35-41) obviously do not sustain its contention. Those cases related to the valuation of personal property or land with structural improvements on it, and it was the structures that were referred to in speaking of reproduction cost. There is a fundamental difference between reproduction cost of structures and the kind of evidence which petitioner chooses to call reproduction of the land. It is only as to structures as they enhance the value of land that replacement or reproduction cost is often considered in awarding compensation, but in measuring the value of vacant land, evidence as to replacement cost is not admissible. Orgel, *Valuation Under Eminent Domain* (1936), sec. 187, p. 586. Under the Fifth Amendment, the United States is obligated to pay just compensation for property it condemns, and the just compensation to which an owner is entitled is normally measured by the fair cash market value of the property that has been taken. *United*

States v. *Toronto Nav. Co.*, 338 U. S. 396, 402; *United States* v. *Miller*, 317 U. S. 369, 374. The jury made its award after consideration of the conflicting evidence of the parties as to the market value of the property taken. Petitioner had ample opportunity, of which it took advantage, to combat or discredit the Government's evidence, which it criticizes at length in its petition at pages 14-29.

Petitioner renews here the contention made below (Pet. 14-29) that there was no evidence of sales of similar property on which a valuation could be based. Upon this factual question the lower courts have found that the evidence clearly reveals that there was one sale of industrial property in the vicinity comparable to the land condemned, and that there were several vacant tracts of land along the canal which are capable of being used as an oil terminal. "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Investors*, 335 U. S. 211, 214; *United States* v. *Dickinson*, 331 U. S. 745, 751; *Allen* v. *Trust Co.*, 326 U. S. 630, 636; *United States* v. *O'Donnell*, 303 U. S. 501, 508.

2. The holding of the Court of Appeals that the Government was not required to pay more in a condemnation action than the value of the land without the improvements the Government had made is sustained by decisions of this Court (*Searl*

v. *School District, Lake County,* 133 U. S. 553; *Consol. Turnpike* v. *Norfolk &c. Ry. Co.,* 228 U. S. 596), and petitioner does not suggest any respect in which it claims the Court of Appeals erred in this ruling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1951.

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